

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DONALD STOUDMIRE</b>	:	<b>SMALL CLAIMS</b>
		<b>DETERMINATION</b>
		<b>DTA NO. 820322</b>
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Periods Ending March 31, 2003 and December 31, 2003.	:	

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Petitioner, Donald Stoudmire, 162-15 75<sup>th</sup> Street, Flushing, New York 11366, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the periods ending March 31, 2003 and December 31, 2003.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York, on January 11, 2006 at 9:15 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (John V. Primo).

Since neither party elected to reserve time to file a post hearing brief, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

***ISSUE***

Whether petitioner was a person required to collect, truthfully account for and pay over the New York State and City income taxes withheld by S & H Security Company, Inc., from the wages paid to its employees, and if so, whether he willfully failed to perform such duties and is thus liable for a penalty equal in amount to the taxes not collected, truthfully accounted for and paid over.

***FINDINGS OF FACT***

1. S & H Security Company, Inc. ("S & H") was incorporated in the State of New York on March 2, 1999, and its primary business activity involved providing security and watch guard services at various construction sites in the metropolitan New York City area. During the periods at issue in this proceeding, S & H maintained a single office located at 2916 Frederick Douglass Blvd., 2<sup>nd</sup> Floor, New York, New York.

2. The 2003 U.S. Income Tax Return for an S Corporation filed by S & H reported that petitioner, Donald Stoudmire, and Herbert Huggins were each 50% shareholders of the corporation. The \$35,344.00 ordinary loss shown on the 2003 return was split equally between petitioner and Mr. Huggins. Petitioner held the title of vice-president, while Mr. Huggins was the president of S & H.

3. In 2003, petitioner and Mr. Huggins disagreed as to the direction S & H should take and their relationship, which petitioner says "got nasty," quickly deteriorated. In this proceeding, it is undisputed that S & H withheld from the wages paid to its officers and employees New York State and City personal income taxes and that it failed to remit to the Division of Taxation ("Division") State and City personal income taxes of \$4,684.52 and \$3,703.47 for the quarters ending March 31, 2003 and December 31, 2003, respectively.

4. On April 19, 2004, the Division issued two notices of deficiency to petitioner asserting that he was “an Officer/Responsible Person of S & H Security Company, Inc.” and, as such, was liable, pursuant to Tax Law § 685(g), “for a penalty in an amount equal to the tax not paid” by S & H. The Notice of Deficiency issued for the quarter ending March 31, 2003 asserted a penalty due of \$4,684.52 and the Notice of Deficiency for the quarter ending December 31, 2003 asserted a penalty due of \$3,703.47. The Division stipulated that a payment of \$149.65 was applied to the Notice of Deficiency issued for the quarter ending March 31, 2003, thus leaving a balance due of \$4,534.87.

5. Petitioner did not initially make any contributions of capital when S & H was formed; however, he did contribute funds later on. From an operational standpoint, petitioner was “in the field” where he made sure that S & H employees were present at the proper location, in uniform and fulfilling all required duties. Mr. Huggins was primarily responsible for the administrative end of the business, including the filing and payment of all taxes. Both petitioner and Mr. Huggins had full-time jobs and they performed their duties for S & H in their spare time.

6. S & H’s corporate checkbook was kept at the 2916 Frederick Douglass Blvd., New York, New York office. Any check over the sum of \$200.00 required the signatures of both petitioner and Mr. Huggins. While Mr. Huggins generally handled all financial matters, petitioner, if he was in the office, would sign checks and other legal documents, including tax returns.

#### ***SUMMARY OF PETITIONER’S POSITION***

7. Petitioner claims that Mr. Huggins walked away from the business in November 2003 and that he formally resigned in March 2004. Petitioner concedes that he tried to keep the business going after Mr. Huggins left and he accepts liability for any past due taxes which may

have accrued after January 1, 2004. For periods prior to January 1, 2004, petitioner argues that Mr. Huggins was in total control of all financial matters and is the individual solely responsible for any taxes owed by S & H.

### ***CONCLUSIONS OF LAW***

#### A. Tax Law § 685(g) provides as follows:

Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Tax Law § 685(n), in turn, furnishes the following definition of a “person” subject to the section 685(g) penalty:

the term person includes an individual, corporation, partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs.

B. The question of whether someone is a “person” under a duty to collect and pay over withholding taxes is a factual one. Factors which should be considered are, *inter alia*, whether the particular individual signed tax returns, derived a substantial part of his or her income from the corporation, or had the right to hire and fire employees (*Matter of Malkin v. Tully*, 65 AD2d 228, 412 NYS2d 492, 494, *affd* 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person’s official duties, the amount of corporation stock he or she owned, and the authority to pay corporate obligations (*Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272,273; *see, Matter of McHugh v. State Tax Commn.*, 70 AD2d 987, 417 NYS2d 799, 801).

C. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino*, Tax Appeals Tribunal, October 22, 1990; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). Furthermore, if petitioner is found to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is “willful” within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in *Matter of Levin v. Gallman* (42 NY2d 32, 396 NYS2d 623), the test is:

whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes. . . . No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (*id.*, 396 NYS2d at 624-625; *see, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

D. After careful consideration of the entire record, I conclude that petitioner was a person who willfully failed to collect and remit the New York State and City income taxes withheld by S & H from employees’ wages and, as such, is liable to for the penalty imposed pursuant to Tax Law § 685(g). There is sufficient evidence in the record to establish that petitioner was a responsible person including his status as an officer and 50% stockholder of the corporation, his signature on checks drawn on the corporate checking account, his participation in the financial and business affairs of the corporation, his signature on tax returns and his 50% interest in the

income or loss generated from the corporation (*see, Matter of Wendel*, Tax Appeals Tribunal, February 3, 2000).

E. Petitioner's assertion that Mr. Huggins was solely responsible for any unpaid withholding taxes which accrued prior to January 1, 2004 is rejected. It is well settled that corporate officers cannot absolve themselves from liability for unpaid taxes by disregarding their duty and delegating it to other corporate officers (*Matter of Risoli v. Commissioner of Taxation & Fin.* 237 AD2d 675, 654 NYS2d 218; *Matter of Ragonesi v. State Tax Commission* 88 AD2d 707, 451 NYS2d 301). Furthermore, there is no credible evidence in the record before me to show that petitioner's failure to remit the taxes due was the result of duress or inadvertence.

F. The petition of Donald Stoudmire is denied and the Notice of Deficiency for the quarter ending March 31, 2003, as reduced by the \$149.65 payment, and the Notice of Deficiency for the quarter ending December 31, 2003 are both sustained.

DATED: Troy, New York  
April 6, 2006

/s/ James Hoefer  
PRESIDING OFFICER